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3 UNITED STATES DISTRICT COURT
4 SOUTHERN DISTRICT OF CALIFORNIA
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6 DAVID R. RUBY, Chapter 7 Trustee,
7 Plaintiff,
8 v.
9 HELEN E. RYAN and JOHN J. RYAN, JR.,
10 Defendants.

Case No.: 15cv2537-GPC (BLM)

**REPORT AND RECOMMENDATION RE:
MOTION FOR THIRD PARTY CLAIM OF
EXEMPTION**

[ECF No. 39]

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12 This Report and Recommendation is submitted to United States District Judge Gonzalo P.
13 Curiel pursuant to 28 U.S.C. § 636(b) and Civil Local Rules 72.1(c) and 72.3(f) of the United
14 States District Court for the Southern District of California. For the following reasons, the Court
15 **RECOMMENDS** that Mykal Ryan's motion for third-party claim of exemption be **GRANTED** and
16 his request for refund of the garnishment fee be **DENIED**.

17 **FACTUAL AND PROCEDURAL BACKGROUND**

18 On August 12, 2013, the United States District Court, Eastern District of Virginia entered
19 a default judgment in favor of David Ruby, Chapter 7 Trustee, in the amount of \$34,093.08
20 against Helen Ryan and John Ryan, Jr. jointly and severally, and in the amount of \$318,431.23
21 against Helen E. Ryan, individually. ECF Nos. 1 at 1-2; 2 at 1. On September 29, 2015, and
22 October 2, 2015, David Ruby ("Judgment Creditor") requested this Court enter abstracts of
23 judgment, which the Court subsequently entered against Helen Ryan and John Ryan ("Judgment

Debtors"). See ECF Nos. 4-5, 8-9. On September 29, 2015, and October 2, 2015, Judgment Creditor filed writs of execution against Judgment Debtor Helen Ryan. See ECF Nos. 3 & 7.

On October 28, 2015, Judgment Creditor filed a notice of levy for "[a]ll bank accounts owned by Helen E. Ryan and/or John J. Ryan, Jr." ECF No. 17, Exh. 1 at 2. On November 4, 2015, U.S. Bank levied \$99,622.73, and an additional \$100.00 as a garnishment fee, from the U.S. Bank account ending in 4226 ("U.S. Bank account x4226") held in the name of Helen Ryan. See ECF No. 27, Exh. 4 at 50. On November 5, 2015, Helen Ryan challenged the validity of the levy, claiming the funds in U.S. Bank account x4226 belonged to her son, Mykal Ryan. See ECF No. 17.

After this Court issued a Report and Recommendation finding that Helen Ryan could not assert a third-party claim for Mykal Ryan, that Mykal had not submitted a Claim of Exemption on his own behalf, and that Mykal had not established that all of the levied funds in U.S. Bank account x 4226 belonged to him, Mykal Ryan submitted a third-party claim of exemption alleging that "all the money deposited to Helen E. Ryan's U.S. Bank Account (x4226) belong[s] to [him]." See ECF Nos. 33 & 39; see also ECF No. 39, Exh. 15 at 35. On May 27, 2016, Mr. Ryan filed a "Motion for Third Party Claim of Exemption Pursuant to CCP Sections 720.310, 688.030, 720.110, 720.120 and 720.130." ECF No. 39 ("Mot."). On June 13, 2016, Judgment Creditor opposed the motion [ECF No. 44 ("Oppo.")], and on June 20, 2016, Mr. Ryan filed a reply in support of his motion [ECF No. 48 ("Reply")].

LEGAL STANDARD

California Code of Civil Procedure provides a procedure for third parties, who are not judgment debtors or creditors, to make claims of exemption for property levied by a writ of execution. See CCP §§ 688.030, 720.110. A third party who claims ownership of levied property

1 must file a claim with "the state department or agency that issued the notice of levy." See CCP
 2 § 688.030(b)(1). The third-party claim must be executed under oath and must contain the
 3 following information:

4 (1) The name of the third person and an address in this state where service by
 5 mail may be made on the third person.

6 (2) A description of the property in which an interest is claimed.

7 (3) A description of the interest claimed, including a statement of the facts upon
 8 which the claim is based.

9 (4) An estimate of the market value of the interest claimed.

10 CCP § 720.130(a). Further, "[a] copy of any writing upon which the claim is based shall be
 11 attached to the third-party claim." CCP § 720.130(b). A third-party claim must be filed with the
 12 levying officer before the officer sells the property, delivers possession of the property to the
 13 creditor, or pays proceeds of collection to the creditor. CCP § 720.120. The creditor opposing
 14 a third-party claim must object within ten days after service of the claim. CCP § 720.140(b).

15 Either the creditor or the third party "may petition the court for a hearing to determine
 16 the validity of the third-party claim and the proper disposition of the property that is the subject
 17 of the claim." CCP § 720.310(a). The third party bears the burden of proof at a hearing and
 18 can meet its burden by introducing evidence that it owns the levied property. See CCP
 19 § 720.360; Whitehouse v. Six Corp., 40 Cal. App. 4th 527, 530, 535 (Ct. App. 1995).

20 After the third party claimant presents evidence that it owns the property in question, the
 21 burden of proof shifts to the judgment creditor to establish that the third party's claim is invalid
 22 or that the judgment creditor's claim is superior. See Oxford St. Prop., LLC v. Rehab. Assoc.,
 23 LLC, 141 Cal. Rptr. 3d 704, 712 (Ct. App. 2012) (citation omitted). As a general rule, "a
 judgment or levy reaches only the interest of the debtor in the property because a judgment

1 creditor can acquire no greater right in the property levied upon than that of its judgment
2 debtor.” See Regency Outdoor Advertising, Inc. v. Carolina Lanes, Inc., 37 Cal. Rptr. 2d 552,
3 556 (Ct. App. 1995); see also Oxford St. Prop., LLC, 141 Cal. Rptr. 3d at 712 (“A security interest
4 attaches only to whatever rights the debtor has in the collateral.”).

5 **DISCUSSION**

6 Mr. Ryan claims the levied U.S. Bank account x4226 funds are exempt because he is not
7 the judgment debtor and all of the funds in the account belong to him. Mot. at 1-2, Exh. 15 at
8 35. Mr. Ryan acknowledges that the account was opened by and held in the name of his mother,
9 Judgment Debtor Helen Ryan, but claims that it was done that way due to the symptoms
10 associated with his Post Traumatic Stress Disorder (“PTSD”) diagnosis, and maintains that the
11 funds in the account are exempt from levy because they were his social security, veterans’, and
12 federal retirement benefits. See Mot. at 1-2, 5-7; id., Exh. 15 at 35; ECF No. 39-1, Declaration
13 of Mykal Ryan (“Mykal Ryan Decl.”) at 3-6.

14 Judgment Creditor argues in his opposition that the funds in U.S. Bank account x4226
15 are not Mr. Ryan’s property and are not exempt from levy. Oppo. at 1-2. Alternatively,
16 Judgment Creditor contends that Mr. Ryan is judicially estopped from claiming ownership of the
17 funds in the account because Mr. Ryan failed to claim the account in his bankruptcy schedules
18 during his bankruptcy proceedings. See id. at 12-13. Judgment Creditor contends that Mr. Ryan
19 has engaged in a scheme of fraudulent transfers to avoid his creditors’ claims, that Mr. Ryan is
20 dishonest, his “testimony is not to be trusted,” and that the Court should find that the funds no
21 longer belong to Mr. Ryan and are subject to levy. See id. at 7-11.

22 In his reply, Mr. Ryan reiterates that the funds in U.S. Bank account x4226 belong to him
23 and are exempt because they are his social security, veterans’, and military retirement benefits.

1 See Reply at 1. Mr. Ryan further argues that the placement of the funds in a bank account
 2 opened in his mother's name did not divest the funds of their exempt status because social
 3 security and veterans' benefits are exempt regardless of where such funds are deposited. Id.
 4 at 2, 5-7.

5 **I. Mr. Ryan's Third-Party Claim of Exemption**

6 Mr. Ryan asserts in his claim of exemption that he is not a judgment debtor, that "all
 7 deposits to Helen Ryan's acc[ount] were federal benefits paid to [him]," and that "[a]ll of the
 8 money deposited to Helen E. Ryan's U.S. Bank Account (x4226) belonged to [him]." Mot.,
 9 Exh. 15 at 35. In his declaration, Mr. Ryan states that from August 1987 through January 1997,
 10 he was employed as a federal civilian propulsion engineer at the Army Research Lab, that he
 11 subsequently worked as a federal civilian aerospace engineer at an Army Joint Special
 12 Operations Command, and that he served two tours of duty in Iraq as an Army reservist. Mykal
 13 Ryan Decl. at 2. Mr. Ryan declares that the funds at issue always belonged to him and were
 14 never intended to belong to or be used by his mother. Id. at 3. Mr. Ryan explains that in
 15 August 2005, he was diagnosed with PTSD, which rendered him "100% disabled," that he was
 16 also diagnosed with depression, and that he retired "due to disability" on March 14, 2008. Id.
 17 at 2. Mr. Ryan further declares that:

18 [a]round January 11, 2008, just prior to my retirement and around the time I was
 19 diagnosed with the PTSD and the depression, when my symptoms were at their
 20 worst, I had my mother open a bank account at San Diego National Bank
 21 ("SDNB")¹ under her name to make sure in the event of my incapacity, I had a
 place to deposit my funds and so my mother would be able to assist me with
 paying bills or simply just helping me purchase life's necessities. . . . I believe

22 ¹ Mr. Ryan declares that in late 2009 or early 2010, SDNB was sold to U.S. Bank, and that the
 23 SDNB account x5422 was changed to U.S. Bank account x4226, the account from which the
 funds at issue were levied. Id. at 3. Judgment Creditor confirms this statement. Oppo. at 13.

1 that my fear of the unknown and the stress of the diagnosis itself was the reason
 2 the account was opened in my mother's name only. That said, it **was never our**
 3 **intent that the funds belonged to my mother or that they were going to**
be used by her. The funds in that account have always only belonged to
me.

4 Id. at 3 (emphasis in original). Mr. Ryan maintains that the funds at issue are exempt from levy
 5 because they "can be traced directly to [his] social security benefits, retirement benefits or VA
 6 benefits." See id. at 3-6; Mot. at 5; id., Exhs. 2-14.

7 Helen Ryan avers in her declaration that U.S. Bank account x4226 contains Mr. Ryan's
 8 federal deposits, and that Mr. Ryan served two tours in Iraq and is "100% disabled." ECF No. 41
 9 ("Helen Ryan Decl.") at 1-2. Ms. Ryan states that she "ha[s] been with [Mr. Ryan] when his
 10 PTSD flares up and for periods of time it can debilitate [Mr. Ryan] to the point that he completely
 11 withdraws and fails to meet his responsibilities or he takes actions which seem to make no sense
 12 and even harm his interests." Id. at 2. Ms. Ryan explains that she opened and maintained the
 13 account at issue in her name:

14 because we both fear that there could be a time when Mykal's PTSD flares up to
 15 the point where he cannot handle his own life or finances, many years ago, I
 16 opened US Bank Account ending in x4226 under my name so that Mykal would
 17 have a place to deposit his own funds and so that I could assist Mykal with paying
 bills or meeting his necessities of life in the event he became incapacitated as he
 sometimes does because of his illness. It was never our intent that the funds
 belonged to, or were going to be used by, me.

18 Id. Ms. Ryan also states that "the only funds deposited to x4226, save one which was a Morgan
 19 Stanley dividend, were Mykal's" and explains that her Morgan Stanley dividend was deposited
 20 in the account in September 2012 as a result of a banking error.² See id. (citing Exh. 5).

22 ² The U.S. Bank statements confirm a deposit from "MORG STAN DIV" in the amount of
 23 \$1,098.20 on September 5, 2012. Mot., Exh. 5 at 73. Mr. Ryan references the deposit in his
 declaration stating that it "was from [his] mother's Morgan Stanley retirement account," states

1 Mr. Ryan's claim of exemption form was executed under oath and contains the following
2 information: (1) Mr. Ryan's name and address in California where service by mail may be made,
3 (2) a description of U.S. Bank account x4226, and (3) a list of the statutory codes pursuant to
4 which Mr. Ryan claims his exemption³ and a statement that "all deposits paid to Helen Ryan's
5 acct. were federal benefits paid to [Mr. Ryan]." Mot., Exh. 15 at 35. As such, Mr. Ryan's claim
6 satisfies the first three elements of a third-party claim of exemption. See CCP § 720.130. With
7 respect to the fourth element, an estimate of the market value of the interest claimed, Mr. Ryan
8 states in his claim that "[a]ll of the money" in U.S. Bank account x4226 belong to him. Mot.,
9 Exh. 15 at 35. The letter accompanying the claim, which is addressed to the Levying Officer,
10 states that the amount at issue is "\$99,622.73, plus a \$100.00 garnishing fee." Id. at 33.
11 Because the letter appears to be a part of Mr. Ryan's claim of exemption packet, the Court finds
12 that Mr. Ryan's claim sufficiently estimates the market value of the interest claimed and satisfies
13 the fourth element of a third-party claim of exemption. See Mot., Exh. 15; see also CCP
14 § 720.130. This conclusion is further bolstered by Mr. Ryan's statement in his declaration filed
15 in support of his motion for third party claim of exemption that \$99,622.73 levied from U.S.
16 Bank account x4226 is exempt from levy, and that he is seeking reimbursement of the \$100.00
17 garnishment fee. Mykal Ryan Decl. at 2.

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21 that the deposit "may not be . . . exempt from levy," but contends that the "deposit no longer
exists in the account." Mykal Ryan Decl. at 5.

22 ³ Specifically, Mykal Ryan cites the following provisions in support of his claim of exemption:
23 CCP §§ 704.080, 704.110, 704.115, 704.130, 10 U.S.C. §§ 1440 & 1450, 42 U.S.C. § 407, and
38 U.S.C. § 5301. Id.

1 Judgment Creditor does not challenge the sufficiency of the third-party claim of
2 exemption form submitted by Mr. Ryan, but argues that by placing the funds at issue in a bank
3 account under his mother's name, Mr. Ryan "transferred" the funds to his mother, and that "the
4 funds are . . . no longer exempt." Oppo. at 12-13. Mr. Ryan replies that it is irrelevant where
5 his social security and veterans' benefit funds are deposited because such directly-deposited
6 benefits are exempt. See Reply at 5-7 (citing CCP § 704.080 and Kilker v. Stillman, 182 Cal.
7 Rptr. 3d 712, 720 (Ct. App. 2015)); see also Mykal Ryan Decl.; Kilker, 182 Cal. Rptr. 3d at 720
8 (providing that "[s]ection 704.080, subdivision (b) provides an *automatic* exemption . . . for
9 statutorily specified amounts contained in deposit accounts into which the government has
10 directly deposited Social Security payments.").

11 To support his claim, Mr. Ryan provides detailed, unreacted bank records for U.S. bank
12 account x4226 and documents from various federal agencies. See Mot., Exhs. 2-13. Mr. Ryan's
13 bank statements, a letter from the Social Security Administration, and a Social Security Benefit
14 Statement, establish that at least \$98,897 in social security benefits given to Mr. Ryan were
15 directly deposited into U.S. Bank account x4226 during the relevant time period. See Mot., Exhs.
16 2-10; see also Mykal Ryan Decl. at 5. Mr. Ryan's bank statements and a letter from the
17 Department of Veterans Affairs further show that between September 1, 2012 and the date of
18 the levy, at least \$72,262 of his veterans' benefits were directly deposited into U.S. Bank account
19 x4226. See Mot., Exhs. 4-9, 11; see also Mykal Ryan Decl. at 5-6. As such, Mr. Ryan has
20 established that over \$171,159 in social security and veterans' benefit payments to him were
21 directly deposited into U.S. Bank account x4226. See Mot., Exhs. 2-11; Mykal Ryan Decl. at 4-
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6. Such funds are exempt from levy and far exceed the amount of the levied funds at issue.⁴
See 42 U.S.C. § 407(a) (providing that social security benefits are not “subject to execution, levy, attachment, garnishment or other legal process.”); 38 U.S.C. § 5301(a)(1) (providing that veterans’ benefit funds “made to, or on account of, a beneficiary shall be exempt from . . . the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.”).

Because Mr. Ryan presented evidence that he owns the levied funds in U.S. Bank account x4226, the burden of proof shifts to Judgment Creditor to establish that Mr. Ryan’s claim is invalid or that Judgment Creditor’s claim is superior. Oxford St. Prop., LLC, 141 Cal. Rptr. 3d at 712. Judgment Creditor attempts to undermine Mr. Ryan’s ownership claim in the funds at issue by asserting that Mr. Ryan is dishonest and that he should be judicially estopped from claiming ownership of the funds in U.S. Bank account x4226. See *Oppo*. at 7-13.

II. Equitable Considerations

Judgment Creditor argues that Mr. Ryan is judicially estopped from claiming ownership of the funds in U.S. Bank account x4226 because Mr. Ryan did not claim ownership of the

⁴ Judgment Creditor does not challenge any of the withdrawals from the account at issue. See *Oppo*. Nonetheless, the Court has reviewed them. Mr. Ryan’s bank statements establish that the withdrawals from the account were sent to Bank of America, AT&T Uverse, Time Warner Cable, State Farm Insurance, American Express, Costco membership, Auto Club of Southern California, Direct TV, City of San Diego, United Concordia, Triwest Health, and public storage. See *Mot.*, Exhs. 2-9. With regard to the large recurring transfers to Bank of America described as “Payment Check” or “ONLINE PMT,” Mr. Ryan represents in his declaration that these payments were spent on gardening, keeping up the yard and his home, charitable contributions, mortgage and credit card bill payments, taxes, home and car insurance, cable and internet bills, and property upkeep and vehicle maintenance. See Mykal Ryan Decl. at 7. Based upon the bank statements, Mr. Ryan’s declaration, and Judgment Creditor’s lack of challenge, the Court finds that the withdrawals were made for Mr. Ryan’s benefit.

1 account when he filed for bankruptcy on July 16, 2008. Id. Judgment Creditor further alleges
 2 that Mr. Ryan is “dishonest and his testimony is not to be trusted,” and that Judgment Debtor
 3 Helen Ryan is complicit in Mr. Ryan’s “scheme to hinder and defraud” creditors. See id. at 7-
 4 12. Judgment Creditor filed a “Request for Judicial Notice” [ECF No. 44-3 at 1-3 (“Request”)],⁵
 5 and provides Mr. Ryan’s bankruptcy schedules, the “Memorandum Opinion” from Mr. Ryan’s
 6 bankruptcy proceedings, and exhibits describing multiple legal actions against Judgment
 7 Debtors. See Request, Exhs. 1, 5-8.

8 Mr. Ryan denies that he intentionally engaged in any improper conduct and argues that
 9 his alleged involvement in prior bad acts does not entitle Judgment Creditor to the funds in U.S.
 10 Bank account x4226 because bad faith and judicial estoppel are not listed exceptions to
 11 exemptions set forth in 11 U.S.C. § 522. See Reply at 2-4 (citing Law v. Siegel, 134 S.Ct. 1188,
 12 1194, 1196-97 (2014)⁶). Mr. Ryan also asserts that judicial estoppel is an extraordinary remedy,

14 ⁵ Judgment Creditor asks the Court to judicially notice several filings in the United States
 15 Bankruptcy Court for the Eastern District of Virginia; the Superior Court of California, County of
 16 Alameda; the Superior Court of Arizona, County of Maricopa; and the United States District Court
 17 for the Eastern District of Virginia. Request at 1-3. Mr. Ryan does not oppose the request. See
 18 Reply. Federal Rule of Evidence 201 provides that a court may take judicial notice of facts “not
 19 subject to a reasonable dispute” if they are either (1) generally known within the territorial
 20 jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to
 21 sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). The Court
 22 “must take judicial notice if a party requests it and the court is supplied with the necessary
 23 information.” Fed. R. Evid. 201(c)(2). In applying this rule, courts “may take notice of
 proceedings in other courts, both within and without the federal judicial system, if those
 proceedings have a direct relation to matters at issue.” Bias v. Moynihan, 508 F.3d 1212, 1225
 (9th Cir. 2007) (quoting Bennett v. Medtronic, Inc., 285 F.3d 801, 803 n.2 (9th Cir. 2002)).
 Because the documents at issue are court records, the Court **GRANTS** Judgment Creditor’s
 unopposed request to take judicial notice of the documents lodged as ECF No. 44-3, Exhs. 1-8
 (“Request, Exhs. 1-8”).

⁶ In Siegel, the Supreme Court held that a bankruptcy court lacks authority under its inherent
 powers of 11 U.S.C. § 105(a) to surcharge an allowed exemption for payment of administrative
 expenses, even where the debtor claimed the exemption through fraud. Id., 134 S.Ct. at 1195.

1 which should only be applied when a party's alleged inconsistent behavior will result in a
 2 miscarriage of justice, and Judgment Creditor has not established the key factors required for
 3 application of that doctrine. *Oppo*. at 3-4.

4 Judicial estoppel is an equitable doctrine used to protect the integrity of the judicial
 5 process. New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001). California courts consider the
 6 following factors in determining whether to apply judicial estoppel: "(1) [whether] the same
 7 party has taken two positions; (2) the positions were taken in judicial or quasi-judicial
 8 administrative proceedings; (3) the party was successful in asserting the first position (i.e., the
 9 tribunal adopted the position or accepted it as true); (4) the two positions are totally
 10 inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake."
 11 Jogani v. Jogani, 45 Cal. Rptr. 3d 792, 797 (Ct. App. 2006) (citing Aguilar v. Lerner, 12 Cal. Rptr.
 12 3d 287, 295 (2004) (internal quotation omitted)). Because "judicial estoppel is an equitable
 13 doctrine, . . . its application, even where all necessary elements are present, is discretionary,"
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15 The Supreme Court determined that 11 U.S.C. § 522 "sets forth a number of carefully calibrated
 16 exceptions and limitations, some of which relate to the debtor's misconduct." *Id.* at 1196. The
 17 Court reasoned that "[t]he Code's meticulous—not to say mind-numbingly detailed—
 18 enumeration of exemptions and exceptions to those exemptions confirms that courts are not
 19 authorized to create additional exceptions." *Id.* The Supreme Court then concluded that the
 20 Code does not confer "a general, equitable power in bankruptcy courts to deny exemptions
 21 based on a debtor's bad faith conduct" or "the debtor's fraudulent concealment of [an] asset
 22 alleged to be exempt." *Id.*

23 This Court notes that the exemptions considered by the Supreme Court in Siegel concern
 exemptions asserted under the Bankruptcy Code. In this case, Mr. Ryan is not asserting
 exemptions under the Bankruptcy Code, but under California law and several federal statutes
 governing federal benefits. *See* Mot., Exh. 15 at 35. The Supreme Court in Siegel also noted
 that "when a debtor claims a *state-created* exemption, the exemption's scope is determined by
 state law, which may provide that certain types of debtor misconduct warrant denial of the
 exemption." Siegel, 134 S.Ct. at 1196-97 (emphasis in original) (citation omitted). Accordingly,
 the Court will consider the merits of Judgment Creditor's equitable arguments.

1 and “should be applied with caution and limited to egregious circumstances.” Jogani, 45 Cal.
 2 Rptr. 3d at 798 (citations omitted).

3 **a. Whether Mr. Ryan Took Two Inconsistent Positions**

4 Judgment Creditor alleges that Mr. Ryan took two inconsistent positions because he failed
 5 to disclose the account at issue in his Schedule B bankruptcy filing. See Oppo. at 12-13 (citing
 6 Request, Exh. 8 at 117). Mr. Ryan acknowledges that he did not list the account in his
 7 bankruptcy schedules, but contends that he did not list *any* accounts, and thus, did not assert
 8 a prior or inconsistent position. Reply at 4.

9 On January 11, 2008, Judgment Debtor Helen Ryan opened the account at issue under
 10 her name but allegedly for the benefit of Mr. Ryan. See Mykal Ryan Decl.; Helen Ryan Decl.
 11 On July 16, 2008, Mykal Ryan filed for bankruptcy and did not list the bank account at issue as
 12 his property. See Oppo. at 13; see also Request, Exhs. 1 at 6; 8. Specifically, in Schedule B,
 13 next to category “[c]hecking, savings or other financial accounts, certificates of deposit, or
 14 shares in banks, savings and loan, thrift, building and loan, and homestead associations, or
 15 credit unions, brokerage houses, or cooperatives,” Mr. Ryan indicated “None.” Request, Exh. 8
 16 at 117. Because Mr. Ryan failed to list the bank account at issue and his ownership of all/some
 17 of the funds in the account as an asset in his bankruptcy proceeding, and is now claiming
 18 ownership of the funds in the bank account in this proceeding, Mr. Ryan has asserted
 19 inconsistent positions in two judicial proceedings. See Hamilton v. State Farm Fire & Cas. Co.,
 20 270 F.3d 778, 784 (9th Cir. 2001) (finding that a debtor asserted inconsistent positions when
 21 he failed to list claims as assets on bankruptcy schedules and sued on the same claims in a later
 22 proceeding). The Court therefore finds that factors 1, 2 and 4 of the judicial estoppel doctrine
 23

are present and weigh in favor of application of the doctrine. See Jogani, 45 Cal. Rptr. 3d at 797.

b. Whether the Bankruptcy Court Accepted Mr. Ryan's Earlier Position

Mr. Ryan argues that the third factor is not satisfied because the bankruptcy court denied his petition and did not discharge his debts. See Reply at 4; Jogani, 45 Cal. Rptr. 3d at 797. Courts have observed that this factor is particularly important in the determination of whether to apply the judicial estoppel doctrine:

courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled," . . . Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," . . . , and thus poses little threat to judicial integrity.

New Hampshire, 532 U.S. at 750-51 (internal citations omitted); Jogani, 45 Cal. Rptr. 3d at 798-99 (same). Success in a prior bankruptcy proceeding has been found where the bankruptcy court relied on the party's first position to discharge or reorganize the party's debt. See Hamilton, 270 F.3d at 784 (finding judicial acceptance factor satisfied where the bankruptcy court discharged a debtor's debt; also noting that the bankruptcy court was not required to "actually discharge debts before the judicial acceptance prong may be satisfied," and that the "court may 'accept' the debtor's assertions by relying on the debtor's nondisclosure of potential claims" by, for example, lifting a stay based in part on the debtor's nondisclosure in its bankruptcy schedules or approving the debtor's plan of reorganization).

In this case, the United States Bankruptcy Court for the Eastern District of Virginia denied Mr. Ryan's petition for discharge of debt. See Request, Exh. 1 at 32. In reaching its decision, the court observed, *inter alia*, that Mr. Ryan's "statements in the Schedules [were] inaccurate

and that those inaccuracies were made knowingly.” Id. at 29-30. Because the bankruptcy court did not accept as true Mr. Ryan’s statements in his bankruptcy schedules and denied his petition for discharge, the Court finds that Mr. Ryan was not successful in asserting his first position that the funds did not belong to him and therefore the third judicial estoppel factor is not satisfied. See Jogani, 45 Cal. Rptr. 3d at 799-800, 811 (concluding that a party did not successfully assert prior position where the party’s prior inconsistent position during his debtor examination testimony was not adopted or accepted as true by the court). Because success in the prior judicial proceeding involving the inconsistent statement is a critical component of the judicial estoppel doctrine, this factor weighs strongly against application of the doctrine. See Zedner v. U.S., 547 U.S. 489, 505 (2006) (holding that the doctrine of judicial estoppel did not apply where petitioner did not “succee[d] in persuading” the district court to accept his earlier position, and where other judicial estoppel factors favored estoppel; concluding that the other factors “d[id] not predominate.”); Jogani, 45 Cal. Rptr.3d at 798 (stating that “[t]he factor of success—whether the court in the earlier litigation adopted or accepted the prior position as true—is of particular importance.”).

c. Whether Mr. Ryan’s First Position was Taken as a Result of Ignorance, Fraud or Mistake

Judgment Creditor alleges that Mr. Ryan’s omission of the bank account at issue in his bankruptcy proceeding was designed to defraud his creditors. See Oppo. at 7-12. Mr. Ryan argues that the omission was inadvertent because his petition, including Schedule B, was filed in August 2008, around the time he was diagnosed with PTSD, and that his condition was nearly debilitating, he had suicidal thoughts, and he was receiving regular care from a psychiatrist. See

1 Reply at 4. Mr. Ryan contends that “[i]t is hard to imagine anyone not being ignorant and or
2 making mistakes when they are in such a debilitating state contemplating suicide.” Id.

3 Mr. Ryan provides a supporting declaration from Dewleen G. Baker, M.D., a psychiatry
4 professor at the University of California School of Medicine and the Director of Research and
5 Neuroscience Unit at the Center of Excellence for Stress and Mental Health at the San Diego VA
6 Health System. ECF No. 39-2, Declaration of Dewleen G. Baker (“Baker Decl.”). Dr. Baker states
7 that in 2008, he diagnosed Mr. Ryan with PTSD and depression, and that he has been treating
8 Mr. Ryan’s conditions for many years. Id. at 2. Dr. Baker further explains that “[i]nitially, the
9 PTSD was very debilitating and Mr. Ryan had many suicidal thoughts among other serious
10 problems and conditions.” Id. Dr. Baker declares that Mr. Ryan’s symptoms include panic
11 attacks, feelings of being overwhelmed and unorganized, an inability to concentrate, feelings of
12 aggression and combativeness, depression and desire to withdraw from others and society, and
13 significant trust and paranoia issues. Id. Dr. Baker further opines that the symptoms:

14 incapacitate [Mr. Ryan] and interfere with his plans and ability to function under
15 normal stresses and especially under magnified stresses such as coping with
16 accusations and court litigation. For example, . . . Mr. Ryan has sometimes failed
17 to timely file court documents and/or has sometimes taken actions or failed to take
any action which might appear irrational or legally unreasonable and might even
prejudice his own interests.

18 Id. Dr. Baker concludes that Mr. Ryan’s “behavior is entirely consistent with his illness and is
19 the reason he continues to be in treatment and take medication.” Id.

20 Mr. Ryan also provides a letter from Rukhsana Khan, M.D., a psychiatrist at the
21 Department of Veterans Affairs at the VA Medical Center in Livermore, CA, dated March 22,
22 2007. Mot., Exh. 16 at 37-38. Dr. Khan states that she has treated Mr. Ryan since August 2005,
23 that Mr. Ryan “reported multiple symptoms that adversely affected his day to day life,” and that

1 those symptoms were “most likely a result of [Mr. Ryan’s] military service in Iraq from April 2003
2 to November 2004.” Id. at 37. Dr. Khan further states that Mr. Ryan’s symptoms are “likely
3 associated with long term exposure to the stresses of war,” and that he suffers from PTSD
4 “secondary to combat exposure.” Id. Dr. Khan further contends that PTSD is a chronic
5 condition, that treatment relieved some of Mr. Ryan’s symptoms, that other symptoms have
6 persisted, and that there is no “assurance that PTSD symptoms suffered by Mr. Ryan can be
7 eliminated.” Id.

8 In light of Dr. Baker’s declaration and Dr. Khan’s letter, the Court cannot conclude that
9 Mr. Ryan’s failure to claim ownership of U.S. Bank account x4226 in his bankruptcy filing was
10 not a mistake committed as the result of his mental illness. Accordingly, this factor weighs
11 against a finding of judicial estoppel. See Jogani, 45 Cal. Rptr. 3d at 797.

12 “The gravamen of judicial estoppel is not privity, reliance, or prejudice [; but] the
13 intentional assertion of an inconsistent position that perverts the judicial machinery.” Id. at 798
14 (quoting Jackson v. Cnty. of Los Angeles, 70 Cal. Rptr. 2d 96, 103 (Ct. App. 1997)). Here, Mr.
15 Ryan was not successful in his bankruptcy petition, so there is no risk of inconsistent court
16 determinations and therefore no basis to impose the judicial estoppel doctrine in the instant
17 case. Further, after considering all of the evidence in this case, including the types and amounts
18 of money deposited into the subject account and Mr. Ryan’s mental illness, the Court finds that
19 this is not one of the “egregious circumstances” warranting the “extraordinary remedy” of judicial
20 estoppel. See Jogani, 45 Cal. Rptr. 3d at 797-98.

21 The Court recognizes that Judgment Creditor has provided significant evidence
22 establishing that other courts have found Mr. Ryan, and his parents, to have been dishonest in
23 other judicial proceedings. See Request, Exhs. 1, 3-7. While these findings concern the Court,

the Court's focus is on the sufficiency and legitimacy of the current third-party claim of exemption. In evaluating this claim, there is substantial evidence establishing that (1) Mr. Ryan's social security, veterans', and federal retirement benefits were directly deposited into the subject account for many years, (2) with the exception of one deposit in September 2012, all of the money deposited into the account belonged to Mr. Ryan, (3) the money in the account was used for Mr. Ryan's benefit, and (4) the amount of exempt funds deposited into the account greatly exceeds the amount of levied funds taken from the account. Moreover, two of Mr. Ryan's treating psychiatrists have opined that Mr. Ryan's irrational or unreasonable positions are the result of his mental health conditions and symptoms. See Baker Decl. at 2-3; Mot., Exh. 16 at 37-38. Finally, Judgment Creditor has not established the applicability of the judicial estoppel doctrine since Mr. Ryan was not successful in his bankruptcy petition and his mental limitations undermine the appropriateness of the doctrine. Accordingly, the Court finds that the levied funds from U.S. Bank account x4226 are exempt and **RECOMMENDS** that Mr. Ryan's motion be **GRANTED**.

III. \$100.00 Garnishment Fee

Mr. Ryan requests the refund of the \$100 garnishment fee imposed on U.S. Bank account x4226. See Mot., Exh. 8 at 64, Exh. 15 at 33; Mykal Ryan Decl. at 2. Mr. Ryan does not cite any specific authority to substantiate his request and does not challenge U.S. Bank's right to charge service fees for garnishment orders. See Mot.; Reply. The Court thus **RECOMMENDS** that Mr. Ryan's request for the refund of the \$100 garnishment fee be **DENIED**. See In re Alpha Telcom, Inc., 2009 WL 2828495, at *1 (D.Or. Sept. 1, 2009) (denying garnishee's request for a refund of a bank-imposed fee, imposed after the garnishment of funds in the garnishee's bank account).

CONCLUSION AND RECOMMENDATION

Based on the forgoing, the Court **RECOMMENDS** that the District Court enter an Order: (1) approving and adopting this Report and Recommendation, (2) **GRANTING** Mykal Ryan's Motion for Third Party Claim of Exemption, and (3) **DENYING** Mykal Ryan's request for a refund of the \$100 garnishment fee.

IT IS HEREBY ORDERED that any written objections to this Report must be filed with the Court and served on all parties **no later than January 31, 2017**. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties **no later than February 14, 2017**. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998).

IT IS SO ORDERED.

Dated: 1/17/2017


Hon. Barbara L. Major
United States Magistrate Judge